No. 71-1178

In The Supreme Court of the United States

OCTOBER TERM, 1971

GULF STATES UTILITIES COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. at 1a) is reported at 454 F. 2d 941 (1971).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered October 12, 1971 (Pet. App. B, at p. 30a). Petition for rehearing was denied December 15, 1971 (Pet. App. C, at p. 31a). The petition for writ of certiorari was filed March 13, 1972, and was granted May 30, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the FPC has a duty to investigate charges of Sherman Act violations under § 204 of the Federal Power Act.

2. Whether the FPC and the SEC have different duties for investigation of alleged Sherman Act violations in proceedings under § 204 of the Federal Power Act and under § 6 (a) and § 7 (d) (6) of the Public Utility Holding Company Act, respectively.

3. Whether the Court of Appeals can require the FPC to investigate antitrust allegations found to be irrelevant by the FPC.

STATUTES INVOLVED

Section 204 of the Federal Power Act, 16 U.S.C. §824c, a part of Subchapter II of the Federal Power Act, 16 U.S.C. §§ 824-824h, formerly 49 Stat. 847 (1935), is the statutory provision directly involved and is set forth as Appendix A at the end of this brief.

Sections 201, 202, subsections (a) and (b), 203, 205, 206, 305, 306, 307, and 313 of the Federal Power Act, 16 U.S.C. § 824, § 824a, subsections (a) and (b), § 824b, § 824d, § 824e, § 825d, § 825e, § 825f, and § 825*l*, and § 11, subsections (a) and (b) of the Clayton Act, 15 U.S.C. § 21, subsections (a) and (b), are useful for comparison or related to argument and are set forth, as is § 204, 16 U.S.C. § 824c, in Pet. App. G. pp. 43a-59a, inclusive.

STATEMENT

The Federal Power Commission (FPC) proceeding in this case [FPC Docket No. E-7567] involved an application[1] by Petitioner, Gulf States Utilities Company (Gulf

[1] R 1-53. "R" refers to the Record in Joint Appendix filed in the Court of Appeals below and incorporated in the Single Appendix in this Court by grant of permission to do so.

States) for authority under § 204 of the Federal Power Act[2] to issue and sell $30,000,000 of First Mortgage Bonds for cash, at competitive bidding pursuant to FPC Regulation § 34a, for the purpose of repaying maturing short-term notes previously issued pursuant to an uncontested FPC order [FPC Docket E-7509]. The Cities of Lafayette and Plaquemine, Louisiana, (Cities) filed a Protest and Petition to Intervene[3] in this proceeding alleging that Gulf States had engaged in frivolous and repetitive litigation, a public relations drive, and a lobbying effort against the funding by the Rural Electrification Administration (REA) for construction of generation and transmission facilities by the Louisiana Electric Cooperative, Inc. (LEC) in the immediate service area of Gulf States in Louisiana. The Cities alleged further that GSU was negotiating with the Administrator of the REA and the LEC, in concert with two other adjoining, investor-owned electric utility companies, for a result inconsistent with a 1968 Pooling and Interconnection Agreement between the Cities, LEC, and the Dow Chemical Company "apparently" violative of the antitrust laws.[4] The Cities alleged that the proceeds of the bond issue would be used by Gulf States to finance or refinance such activities.[5] They urged that the financing could not be approved "unless conditioned on the cessation of such apparently unlawful actions and the establishment of a program which would rectify the damage which has already been done."[6] Cities' alle-

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[2] 16 U.S.C. § 824c, passed August 26, 1935, as Title II 49 Stat. 803. References merely to § 204 are intended as references to that section of the Federal Power Act.

[3] R 54-160.

[4] R 59-64.

[5] R 56.

[6] R 56.

gations are described in the opinion of the court below (Pet. App. A, pp. 5a-6a).[7] Gulf States answered (R. 263) pointing out that the bond proceeds would be used merely to refund short-term securities theretofore authorized by an uncontested FPC order and urging the irrelevancy of intervenors' contentions on that and other grounds.[8]

The FPC permitted Cities' intervention but without a hearing overruled the same and granted Gulf States authorization for issuance of the bonds (Pet. App. D, at p. 32a). Thereupon, Gulf States publicly invited competitive bids for the bonds, the best bid was approved by order of the FPC,[9] accepted by Gulf States and an agreement for purchase and sale of the bonds was entered into between Gulf States and the purchasers. Thereafter purchasers, within the next several days, resold to the general public in accord with investment banking practice. Cities' petition for rehearing was overruled by the FPC (Pet. App. F, at p. 41a). Cities filed Petitions for Review of Orders of the FPC in the U. S. Court of Appeals for the District of Columbia Circuit, where it was docketed as Cause No. 71-1041 and consolidated, for purposes of argument, with Causes Nos. 24,764 and 24,963 wherein Cities were petitioners, Securities and Exchange Commission (SEC) was respondent and Louisiana Power & Light Company was intervenor. The court disposed of all three numbered causes in a single opinion (Pet. App. A, p. 1a). Facts and contentions of the parties are more extensively set forth in the opinion of the Court of Appeals below (Pet. App. A, p. 1a, 5a-6a).

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[7] *City of Lafayette* v. *Securities and Exchange Commission*, 454 F.2d 941, 944-5 (D.C. Cir. 1971).

[8] R 263-74.

[9] R 310-11.

SUMMARY

Congress granted the FPC limited authority over securities issues in § 204 to fill a gap in state regulation and to prevent operating electric utilities from engaging in unsound financial practices such as some holding companies had used to produce unjustified increases in the cost of service to the public. It did not intend § 204 to be used as a source of plenary jurisdiction over electric utility operations and practices, nor as a source of FPC responsibility to protect or establish competition in the electric utility industry.

In this case the FPC fulfilled its public interest responsibility under § 204 by refusing to allow the Cities to interfere with a pure financial transaction essential to the financial integrity of the applicant and an integral part of arrangements to pay for facilities to serve expanding electric demand. The FPC should not be required to provide a catch-all forum in proceedings under § 204, for intervenors' complaints of alleged unlawful activities. This is most clear with respect to issuance of securities to the public for cash at competitive bidding under review by the FPC. Such an issuance and the consequent refunding of authorized short-term indebtedness simply did not raise any threshold issues of monopolization or other violation of the Sherman Act.

The concern of this Court in *Denver & Rio Grande* about the competitive issues involved in *acquisition* of securities is not applicable here, since the instant case does not involve issuance of securities to or for the acquisition of another utility. If this Court now had before it such a case, § 203 of the Federal Power Act, its underlying policies, and the principles of *Denver & Rio Grande* each would need examination independently.

The Court should reverse and instruct that the FPC has no jurisdiction or duty to investigate or order hearings under §204 of complaints such as those made by the Cities in this case.

ARGUMENT

Denver & Rio Grande Western Railroad Co. v. United States[10] is Inapplicable to the Case Now Before this Court.

The court below treated *Denver & Rio Grande* as controlling here. It undertook no independent analysis of the issue in the instant case beyond deciding that the FPC must administer § 204 of the Federal Power Act as the Supreme Court in *Denver & Rio Grande* had required the ICC to administer § 20a of the Interstate Commerce Act. This is evident from the Court of Appeals' opinion as a whole and from its specific statement:

> The action of the FPC in the order before us is plainly inconsistent with its duties as developed in *Denver & Rio Grande*.[11]

If *Denver & Rio Grande* does not support the judgment of the court below, then it has no support. Accordingly, it is deemed first in order of importance to distinguish *Denver & Rio Grande* before proceeding to the merits of the issue before this Court.

The question before the court in *Denver & Rio Grande* was whether the ICC complied with its statutory responsibilities in a proceeding under § 20a of the Interstate Commerce Act when it approved without consideration of control or anticompetitive consequences the issuance to Greyhound Corporation (Greyhound) of 500,000 shares which

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[10] 387 U.S. 485 (1967).

[11] Pet. App. A, p. 16a; 454 F.2d 941, 950.

would constitute 20% of the common stock of Railway Express Agency, Inc. (Railway Express).[12] The application for authorization revealed a plan by which Greyhound might subsequently acquire a majority of the outstanding shares. Both Railway Express and Greyhound were subject to ICC jurisdiction, as noted in the lower court opinion in *Denver*. Minority stockholders of Railway Express, motor bus competitors of Greyhound and others, including the Justice Department, intervened in the proceedings to protest. Intervenors sought a hearing on the questions whether Greyhound's acquisition of the stock was in the "public interest" and for a lawful object" and raised the issue that the 500,000 share sale was the first step toward establishing a virtual monopoly of express transportation and "control" by Greyhound of Railway Express, necessitating a hearing under § 5 of the Interstate Commerce Act which deals with control of one carrier by another through acquisition of stock. The Justice Department, as an intervenor, urged the ICC to conduct a hearing to determine whether the transaction would violate § 7[13] of the Clayton Act concerning acquisitions of stock with the effect of substantially lessening competition or tending to create a monopoly. The ICC approved Railway Express' issuance of 500,000 shares without a hearing. The Supreme Court declared that § 20a, like § 5, must be read in the context of overall ICC responsibilities, that such *responsibilities included enforcement of the Clayton Act* under § 11[14] of that Act, and also that *the advancement of the National Transportation Policy,*[15] *read into the "public interest" standard of § 5, was another persistent and overriding duty, equally applicable to § 20a.*

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[12] 387 U.S. 485, 487.
[13] 15 U.S.C. §18.
[14] 15 U.S.C. §21.
[15] The National Transportation Policy provides for regulation to

This Court held under the facts that the ICC could delay a hearing under § 5 of the Interstate Commerce Act, but held the record in the § 20a proceeding revealed serious questions *under § 7 of the Clayton Act* which *required the ICC to hold hearings* and that no justification existed for delay. Under the facts §7 did not relate to a *stock issue by Railway Express* but only to *stock acquisition by Greyhound* (as did § 5 of the Interstate Commerce Act). Greyhound had made no application. The only ICC proceeding before this Court for review was Railway Express' application to *issue* stock. Section 20a(6) which related to Railway Express' stock *issuance* provides that *hearings are not required* but that the ICC may hold hearings in a proceeding if it sees fit.[16] The opinion in *Denver & Rio Grande* states the question before the Court was whether the ICC had a statutory *duty* under § 20a to *consider* anticompetitive consequences of the stock issue by Railway Express. In the context of the proceeding before it, this Court held that it did, *taking into account ICC responsibilities under the Clayton Act and the National Transportation Policy.* In effect this Court held that in the proceeding before it the ICC must "consider" anticompetitive consequences because it could not shut its eyes to its responsibilities under other laws and thus must hold the hearings which § 7 of the Clayton Act required with regard to the prospective Greyhound stock acquisition revealed to the ICC in Railway Express' § 20a proceeding. The Sherman Act was not raised by the facts, contentions or arguments of the parties or discussed by the Court in *Denver & Rio Grande.*

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accomplish various things: *"without unjust discriminations, undue preferences, or advantages, as unfair or destructive competitive practices."* (Emphasis supplied.) 54 Stat. 899, 49 U.S.C.A. (note preceding § 1).

[16] 49 U.S.C. § 20a(b). See *The Chicago Junction Case,* 264 U.S. 258, 265, n. 10 (1924).

What the opinion in *Denver & Rio Grande* made crystal clear was that the ICC must read into the "public interest" test of § 20a of the Interstate Commerce Act anticompetitive responsibilities imposed upon it by the Clayton Act and the National Transportation Policy. The policy declaration in § 201[17] of the Federal Power Act and in the legislative history thereof shows no such responsibilities. The FPC is not charged with the duty to enforce the Clayton Act,[18] and is not governed by the National Transportation Policy. By failing to recognize the distinction inherent in those factors and in the factual context within which the statutes were being considered, as it must in fairly judging FPC responsibility under § 204 of the Federal Power Act, and by relying on a similarity of language between § 204 and parts of § 20a, the Court of Appeals fell into the error of tracking in this case the directions of this Court to the ICC in *Denver & Rio Grande*. The breadth of jurisdiction as well as the focus of public interest of the FPC under the Federal Power Act are altogether different from those of the ICC under the Interstate Commerce Act. The court below should not have treated *Denver & Rio Grande* as controlling in the instant case.

I. FPC Had No Duty to Investigate Cities' Charges Because Congress Did Not Grant Power to the FPC to Deal With Sherman Act Violation Under § 204.

A. In § 204 Proceeding, the FPC Need Consider Only Matters Which Might Impair the Issuer's Financial Integrity or Ability to Perform Its Public Utility Responsibilities.

1. The administrative interpretation of § 204 by the FPC is entitled to great weight and should be controlling here.

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[17] 16 U.S.C. §824.

[18] *California* v. *Federal Power Commission*, 369 U.S. 482 (1962).

The FPC has said:

> The plain purpose of § 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities.[19]

In doing so the FPC considered the purpose of § 20a of the Interstate Commerce Act from which the draftsman of § 204 borrowed language, and said:

> The leading historian of the Interstate Commerce Commission summed up the purposes of § 20a as follows:
>
> "While this extension of the commission's authority was designed, indirectly, to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing, its dominant purpose was to maintain a sound structure for the rehabilitation and support of railroad credit, and for the consequent development of the transportation system. It aimed to render impossible the recurrence of the various financial scandals, with their destruction of confidence in railroad investment, which had become notorious, and to prevent the subordination of the carriers' stake as transportation agencies to the financial advantage of alien interests." 1 Sharfman, Interstate Commerce Commission 190 (New York 1931).
>
> It is apparent that in modeling § 204, 16 U.S.C.A. § 824c, upon § 20a of the Interstate Commerce Act, 49 U.S.C.A. § 20a, Congress must have had similar objectives.[20]

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[19] *Pacific Power & Light Co.*, 27 F.P.C. 623, 626 43 P.U.R. 3d. 86, 90 (1962).

[20] *Pacific Power & Light Co.*, 27 F.P.C. 623, 627, 43 P.U.R. 3d 86, 91 (1962).

The Court of Appeals gave no weight to *Pacific Power & Light Company* treating it, in effect, as overruled by *Denver & Rio Grande*. But this Court did not differ there with Sharfman as to the purpose of § 20a or undercut the FPC's reliance on his views in *Pacific Power and Light*. In effect the holding in *Denver & Rio Grande* is that the ICC could not shut its eyes to facts appearing in a § 20a proceeding which revealed its obligation under the Clayton Act to hold a hearing.

The Public Utility Holding Company Act of 1935, and the Federal Power Act originated as parts of a single act, The Public Utility Act of 1935, and are among the few enacted to regulate particular industries in the public interest which confer on the administering agency authority over the issuance of securities. Both the SEC and the FPC, when presented with the issue as a case of first impression, interpreted the acts which it was their primary responsibility to administer as not requiring consideration of control or anticompetitive consequences in exercising their duty to consider approval of the issuance of securities.

The FPC's construction of § 204 has stood since 1962. This Court has said:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agents charged with its administration.[21]

In failing to give appropriate deference to FPC construction of § 204, the Court of Appeals erred.

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[21] *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. Legislative history shows Congress was only concerned with financial integrity.

Section 204 of the Federal Power Act was enacted as Title II of the Power Utility Act of 1935.[22] The Act was an outgrowth of increasing national concern about concentration of control and financial manipulation in the public utility business, in particular the public utility holding companies. It is evident from the messages of the President,[23] the report of the National Power Policy Committee,[24] and the committee reports to the Senate[25] and House[26] that the motivating concern, underlying the legislation to control holding companies permitted to continue as such, as well as the operating units to be spun off and regulated under Title II, was to put the public utility industry on a sound financial basis to restore investors' confidence in and strengthen the market for utility securities, and to protect the public against unsound financial practices.[27]

The committee report to the Senate expressly stated this policy:

> Control over the capitalization of operating utilities is plainly an essential means of safeguarding the public against the unsound financial practices which make

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[22] 49 Stat. 838. Title I of such Act is known as the Public Utility Holding Company Act of 1935.

[23] Sen. Rep. No. 621, 74th Congress, 1st Session, pp. 2-3 (1935).

[24] Id., Appendix, pp. 55-60.

[25] Id., pp. 1-60.

[26] H.R .Rep. No. 1318, 74th Congress, 1st Session, pp. 1-54 (1935).

[27] The President stated with regard to the first drafts of the bill, which were not changed in their overall thrust, that it would "surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor." Message of March 12, 1935, Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 2.

impossible the proper and most economical performance of public-utility functions.[28]

The committee report to the House made it clear that § 204 and the authority of the FPC under it were quite limited by stating that, "Under subsection (a) approval of security issues must be obtained in cases where no state commission has control. Approval *must* be given if the issue is for a lawful purpose, consistent with the proper

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The Report of the National Power Policy Committee on Public-Utility Holding Companies expressed the need to cure the then existing evils of "overcapitalization" and "unsound capitalization", "security charges far beyond the value of the holding company to the industry", "securities . . . issued to acquire new properties . . . at prices often far in excess of any reasonable estimate of the value of those properties", transactions injecting "temporary and unhealthy stimulation into the securities markets which discourages intelligent permanent investors," and accepted the advantages of "stable and predicable (sic) markets." *Id.*, p. 56.

The Report further emphasized that "Security issues should be limited to purposes necessary in the public interest, which accords with the ultimate purposes of the legislation; and each security issued should bear a proper relation to the capital of the company, its existing securities, the securities of the companies in a geographically and economically related system, and, above all, to the prudent investment in the properties of the issuer and its underlying companies. Except for necessary discretionary power in the commission in the case of refunding issues, new securities should be limited to par value common stock, with appropriate voting rights, and to first-lien bonds, i.e., bonds having a first lien either on physical assets of the issuer or upon first-mortgage bonds of operating subsidiaries.

"In this as in almost every phase of the holding-company problem the ultimate interests of consumers and investors are identical. In a system burdened with overcapitalized and debt-ridden holding companies, the consumers of operating subsidiaries have to support the topheavy structure by paying high rates and by enduring poor service from inadequately maintained plants." *Id.* p. 59.

The concern about *issuance* of securities evidenced above has a different focus from concern about *acquisition* of securities reflected in the following quote from the Report: "The commission should have power to prevent acquisitions at prices which do not bear a proper relation to the capital prudently invested in the underlying utility properties, or if the acquisition would tend to create monopoly or restraint of trade in the exercise of control of public-utility companies". (Emphasis supplied.) *Ibid.*

[28] Sen. Rep. No. 621, 74th Cong. 1st Sess. p. 50.

performance by the applicant of service as a public utility." (Emphasis supplied.)[29]

Congress simplified the language used in an earlier draft of § 204; but there is no evidence of Congressional intent thereby to expand the scope of administration of § 204 to include nonfinancial considerations.[30] The report to the Senate included a comment on the changed content of § 204 and, without disaffirming the language of the earlier bill, merely reported that such section:

> . . . has been rewritten to attain greater flexibility and workability than would have been possible under the original section. The language defining the purposes for which securities may be issued has been taken substantially from Section 20a of the Interstate Commerce Act, which has proved its usefulness.[31]

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[29] H.R. Rep. No. 1318, 74th Cong. 1st Sess., p. 28. This Report stated further that subsections (b), (c) and (d) were merely "procedural." Thus, they were not intended to expand the scope of FPC jurisdiction under § 204(a).

[30] An earlier draft of present § 204 was as follows:

> Section 206.(a) No public utility shall issue any security . . . unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue. . . . The Commission shall make such order only if it finds that such issue . . . is for one or more of the following purposes and no others, and is reasonably necessary or appropriate for such purpose or purposes: The acquisition of property; the construction, completion, extension, or improvement of facilities or service of the public utility; the discharge or lawful refunding of its obligation; and the reimbursement of monies actually expended from sources other than the issue of securities for any of the aforesaid purposes ....

Hearings on H. R. 5423. H. R. Committee on Interstate and Foreign Commerce, 74th Cong. 1st Sess., pt. 1, p. 33.

[31] Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 20.

The language change to achieve flexibility was apparently in response to a suggestion to add "or for such other purpose as the Commission might approve" to the itemized list of purposes in such original draft. See Hearings on S. 1725, Sen. Committee on Interstate Commerce, 74th Cong. 1st Sess., p. 983 (1935). The language change provided more administrative discretion but did not expand the basic intent to deal only with financial matters.

At the time Congress enacted the Public Utility Act of 1935, thirty-two[32] of the forty-eight states of the Union had state commissions which regulated the issuance of utility company securities. Yet the Congress drafted §204(f) so as to exempt securities issued by public utilities organized and operating in such states. This provision is in sharp contrast with provision of the Interstate Commerce Act which grants the ICC *exclusive* and *plenary* jurisdiction of approval of the issuance of securities of carriers subject to its control.[33] If the Congress had intended that control over issuance of securities be used by the FPC as a tool to accomplish purposes or enforce powers found outside of §204, it would have followed the pattern of the Interstate Commerce Act so readily at hand. The conclusion is inescapable that § 204 was intended only to insure that public utilities subject to the Federal Power Act not escape entirely regulation of the issuance of securities so as to guard the financial integrity of the issuers. The Congress did not even specify conditions as to the quality or extent of state regulation necessary to qualify for the exemption and obviously could not have depended on the individual states to weigh possible impact of federal antitrust laws as a factor in considering authorization of a securities issue. If Congress had intended that such factor be given weight in authorizing the issuance of securities by public utilities subject to the Federal Power Act, it would at the least have granted the FPC exclusive authority over the isuance of securities by all utilities subject to the Act. At the most, it would have specifically provided in the Federal Power Act (as a witness before a Congressional Committee hearing testified it would have

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[32] Congressional Record — House, 74th Con., 1st Session, Vol. 79, Part 9, p. 10378, June 28, 1935.

[33] 49 U.S.C. § 20a (7).

to do if such were its intention)[34] that the FPC consider anticompetitive matters in the grant or withholding of authority.

The legislative history reveals that Congress did not borrow the whole of Interstate Commerce Act philosophy and intended the utility business subject to the Federal Power Act to be on a different footing from other regulated industries, including railroads and other carriers, in that it did not intend to preserve or establish *competition* among public utilities subject to the Federal Power Act. A draftsman of the Federal Power Act testified that "nothing in the bill . . . provides for competition" and stated that "if Congress should desire to establish competition in this industry, it should be written in any legislation adopted by Congress."[35] No such provisions were added.

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[34] See quotation in next footnote.

[35] "MR. PETTENGILL. Mr. DeVane, I want to compliment you upon the patience with which you have stood here for almost 4 hours and answered every question we have asked, and we are asking them only for the purpose of obtaining information. We do not know as much about this as you do. I would like to ask you this question: Here is a market, let us say (indicating) in my home city; here is a generating plant, and we will say that that entire market is being supplied by this generating plant, and it is capable of furnishing sufficient power.

"Here is another generating plant owned by a competitor of this one (indicating and illustrating), and does not have access to this market. It has no transmission lines. Now, do you agree that by order of your Commission you may require this company (indicating) to carry that generating plant's (indicating) energy to that market in competition with the original company?

"MR. DEVANE. No, sir; if I understand your question, the answer to that is 'no'.

"MR. PETTENGILL. Well, section 202(a), makes it the duty of every public utility to transmit energy for any person, and so forth, and to furnish and maintain such services and facilities, and so forth. Now, how do you distinguish the language of the bill from the illustration that I have drawn?

"MR. DeVANE. You are talking about the power now; you

The intended division of the holding companies into operating units by the Public Utility Act of 1935 was not in anticipation of increased regional competition. Abandonment of competition as a method of control was accepted, and nonduplication of facilities was part of the plan to obtain electric service for the public at the lowest possible cost.[36]

With such lack of concern for competitive factors in the passage of the whole Federal Power Act, Congress could

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are talkng about a power to compel transmission?

"MR. PETTENGILL. Yes.

"MR. DeVANE. Power to compel carriers to transmit energy?

"MR. PETTENGILL. Yes.

"MR. DeVANE. That power is complete insofar as it may require transmission in certain cases. There is nothing in this bill, however, that provides for competition. It is entirely silent in that respect and differs from the language of the Interstate Commerce Commission, if that is what you may have in mind.

"There, as you recall, Congress provided that competition should be preserved and if Congress should desire to establish competition in this industry it should be written in any legislation adopted by Congress. There is nothing in this bill that permits one utility to enter another utility's field and in doing so to require the other utility to transport its power for the purpose. There is nothing like that in this bill." Hearings, H. R. Committee on Interstate and Foreign Commerce, 74th Cong. 1st Sess., p. 554.

[36] Sen. Rep. No. 621, supra at pp. 11, 12 states:

> Public utilities with their legalized monopolies are chartered to serve public ends. . . . An operating system whose management is confined in its interest, its energies, and its profits to the needs, the problems, and the service of one regional community is likely to serve that community better. . . . A regional system, with each company confined to consolidation of its own territory, will offer no chance for the territorial raids at fantastic prices with which for 15 years competing holding company systems disturbed the operating business.

It is significant to note here that review of funding for construction of duplicating facilities was the apparent goal of all or most of the activities of Gulf States alleged by the Cities.

Cf. Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86 (1953).

not have intended the simple provisions of § 204 to carry responsibility for such complex factors particularly in view of the stated goal of "flexibility and workability" to attain financial integrity for the industry.

The term "public interest" has often been interpreted to encompass broad authority, but it is not so used in § 204.[37] The FPC deals with different aspects of the whole of its "public interest" responsibility in operating under different parts of the Federal Power Act. Section 204 deals with the issuance of securities, and the prices at which securities are issued affect the *cost* of service to consumers and the *value* of the investment of investors. The special feature of "public interest" with which the Act deals in § 204 is protection of the public from unsound financial practices for the ultimate benefit of the consumer in *low cost* service, and the investing public in *sound investments.*[38]

As pointed out by the Court of Appeals in another decision which the court erroneously failed to consider applicable to the instant case, "public interest" is not the same in a pure financing matter as it is in a licensing or certification procedure:

> In making this argument, the Cooperative necessarily equates the statutory term "public interest" with that term as it is used in licensing or certification statutes. Therein lies the fallacy of its contention.[39]

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[37] Sen. Rep. No. 621, supra, Appendix, p. 59. The Court of Appeals recognized this principle (Pet.App.A at 13a, 454F.2d 941, 948), but refused to be restrained by the narrowness of the policy behind § 204.

[38] If the "public interest" concern of the FPC under § 204 extends to prevention of growth of pyramided structures and the reestablishment of holding company systems through inter-corporate ownership, such issue is wholly foreign to this case and need not be determined here.

[39] *Alabama Electric Cooperative, Inc.* v. *Securities and Exchange*

While there are substantial reasons to reach different results in construing ICC power over securities issues and that of the FPC, the same reasons do not apply when FPC powers under § 204 of the Federal Power Act are compared with those of the SEC under §§ 6 and 7 of the Public Utility Holding Company Act. The court below declined to apply the authority most nearly in point[40] to the scope of FPC responsibility under § 204 while relying on the same authority in arriving at a contrary result[41] in determining the scope of SEC responsibility under §§ 6 and 7 of the Public Utility Holding Company Act. There is every reason to believe the Congress intended the same scope and purpose in securities regulation under Titles I and II of the Public Utility Act of 1935.

Commission, 353 F.2d 905, 907 (D.C. Cir. 1965), cert. den. 383 U.S. 968 (1966).

The Supreme Court has said in a certification case under the Natural Gas Act [Federal Power Commission v. Transcontinental Gas Pipeline Co., 365 U.S. 1, 23 (1961)]:

> . . . "public convenience and necessity" connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination.

The balancing process as used for determination of a certificate of convenience and necessity is not readily adaptable to consideration of a security issue for cash. Of the host of decisions cited by the court below (Pet. App. pp. 12a-13a) for the proposition that regulatory agencies considering the "public interest" have authority or responsibility to consider anticompetitive purpose or consequence, most were certification cases. Only one, and that was *Denver & Rio Grande*, dealt with stock issuance.

The varieties of definitions and declarations of "public interest" in the statutes and determinations by the court are legion. Indeed the variation of meaning and application of "public interest" in other contexts than financing cover too broad a range and are too much a function of applicable policy to particular situations to be useful in interpreting § 204.

[40] Alabama Electric Cooperative, Inc. v. Securities and Exchange Commission, 353 F.2d 905 (D.C. Cir. 1965), cert. denied 383 U.S. 968 (1966); Alabama Electric Cooperative, Inc. v. Securities and Exchange Commission, 359 F.2d 434 (5th Cir. 1966).

[41] Pet. App. at pp. 26a and 27a.

The intent of Congress as revealed by legislative history was to grant the FPC authority under Title II as it granted the SEC authority under Title I of the Public Utility Act of 1935 namely to control the financial integrity of utility companies. For example, the committee report to the Senate stated specifically that:

> The new Part 2 of the Federal Water Power Act seeks to bring about the regional coordination of the operating facilities of the interstate utilities along the same lines within which the financial and managerial control is limited by Title I of the bill.[42]

The available evidence reflects that Congress had in mind the same limited authority regarding financing under both Titles of such Act. The Court of Appeals in the opinion below recognized and held that under Title I of the Act, the SEC could not be required by intervenors to give consideration to alleged utility operating activities from the point of view of undue restraints on competitors or potential competitors in a proceeding by the utility for permission to issue securities; in the same opinion under substantially the same circumstances the court below did require such consideration by the FPC.

From the foregoing examination of legislative history of the Federal Power Act and analysis of such Act in relation to the Interstate Commerce Act and Public Utility Holding Company Act, it is clear that the FPC was correct in its original interpretation of the scope of § 204 and that the Court of Appeals erred in rejecting such interpretation.

B. FPC Duty in a § 204 Proceeding to Consider Charges of a Prospective Sherman Act Violation Would at Most be Limited to Charges Related to Activities within FPC Jurisdiction and Subject to its Regulation.

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[42] Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 18.

Cities complained that Gulf States had unlawfully engaged in litigation, public relations drives, lobbying efforts, and negotiations with government officials. The Federal Power Act does not give the FPC jurisdiction over a public utility's right to engage in such activities. If Gulf States sought to protect its business and retain its customers against the activities of competitors by expending funds to pursue lawsuits, conduct lobbying activities before Congress, appear before administrative agencies, engage in public relations drives, or conduct contract negotiations with governmental agencies or competing generating utilities, it was not required by the Federal Power Act to first obtain permission from the FPC.[43]

Cities alleged no activities subject to FPC jurisdiction under any section of the Federal Power Act. No activities were alleged relating to sale or exchange of energy and establishing physical connections, § 202(b),[44] disposition of property, consolidations and purchase of securities, § 203,[45] rates and charges, §§ 205, 206,[46] or interlocking directorates, § 305.[47]

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[43] This Court has held that publicity campaigns and litigation directed toward obtaining governmental action adverse to prospective competitors is not illegal merely because affected by an anti-competitive purpose nor is it illegal for one to seek action on laws in hope of achieving an advantage for himself and a disadvantage to competitors. *Eastern Railroad's President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). The rule was recently reaffirmed in *California Motor Transport Co., et al* v. *Trucking Unlimited*, 92 S. Ct. 609 (decided January 13, 1972). This line of authority serves to increase the difficulty of the FPC in determining the direction and scope of actions or orders which might be appropriate if investigation of antitrust activity should be required in this case.

[44] *Id.* at § 824a(b).

[45] *Id.* at §824b.

[46] *Id.* at §§ 824d and e.

[47] *Id.* at § 825d.

The Cities sought no interconnection with Gulf States. The court below made irrelevant observations and citations in its opinion[48] which suggest that it may have assumed that this case somehow involved interconnections with Gulf States within the regulatory jurisdiction of the FPC. This was not so. The Cities did not claim they were denied additional interconnections[49] with any of the three private companies involved (being already interconnected with two of them),[50] or that they were refused the right to buy or exchange energy with any of them which might have invoked FPC jurisdiction under § 202 of the Federal Power Act.

Activities by Gulf States which Cities alleged and of which they complained were not "within the purview of the regulating power of the commission," and for that reason it would have exceeded the FPC's powers to make an effort to restrict them by attaching conditions to a § 204 order authorizing securities.[51]

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[48] e.g. quotations from § 202(a), Pet. App. A, p. 18a; reference to § 202(b), Pet. App. A, pp. 18a-19a; text at note 19, Pet. App. A, pp. 19a-20a; and text at note 20, Pet. App. A., p. 20a.

[49] R 312-19. Had interconnection been sought within the authority of the FPC, application could have been made under § 202. Had charges been made of violations under the other sections, § 306 provided a specific procedure for complaints and § 307 for investigations by the FPC of violations of the chapter.

[50] R 58.

[51] *U. S.* v. *Chicago, M., St., P & P R. Co.*, 282 U. S. 311 (1931). In its opinion in that Interstate Commerce Act case, at page 324, the Supreme Court said:

> By subdivision (3) of § 20a the commission is empowered to make its grant of authority to issue securities upon such conditions as the commission may deem necessary or appropriate in the premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed *Standard Union Bridge Co.* v. *United States*, 204 U.S. 364, 384, 385, 27 S. Ct. 367, 51 L. Ed. 523), unless there be found substantial warrant

Further, the FPC had no power to enforce the Sherman Act or even to decide if it had been violated. It could not *judge* prospectively whether the proceeds of a security issue would, unless restrained, be used to violate antitrust laws.[52] The FPC had no power directly to enjoin conduct thought to be illegal under the Sherman Act. It should not, by indirection, enjoin speculated antitrust violation by the ruse of resorting to a § 204 order to impose conditions on the use of cash generated by the sale of securities.

Even though the powers of the ICC are plenary and those of the FPC limited and even though the following quotations involved *merger,* not stock issue, the quotation from an opinion of the Supreme Court dealing with the ICC seems useful here:

> Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitely whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facili-

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for the conditions in the applicable standards established by the provisions of the act relating to such securities.

[52] *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944).

The Federal Power Act contains no authority for the FPC to expand the scope of § 204 to cover such prospective consequences. If it did, then it would seem to follow that the FPC would also have authority over and responsibility for other prospective unlawful consequences which might flow from pursuit or fulfillment of the immediate purpose of a security issue. For example, if construction of facilities were the immediate purpose of the security issue, construction and the completed project could produce violations of federal equal opportunity, wage and hour, safety and pollution laws as well as antitrust laws. (See NAACP, FPC Docket No. R-447, Opin. No. 623, July 11, 1972). This was clearly not intended under § 204. The FPC's authority and responsibility must end with application of the statutory criteria to the *immediate purpose* of the security issue, and not prospective and remote consequences.

> ties and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.[53]

The Federal Power Act is silent as is the Sherman Act on any powers of the FPC to enforce the latter. Congress did not intend that the FPC should attempt to evaluate prospective activities in Sherman Act terms as a part of a § 204 proceeding.

Thus it is clear that the Cities complained of no activity which the FPC had the power to regulate or the threshold duty to consider prior to action under § 204 in this case.

C. Exclusion of Antitrust Considerations from § 204 Proceedings Involving Issuance of Securities for Cash at Competitive Bidding Serves the Congressional Purpose and the Public Interest.

The 1970 and 1971 Annual Reports of the FPC reflect that outstanding securities of the nation's privately owned electric utilities increased $4.39 billion in calendar 1969, and $7.21 billion in 1970, and that during the FPC 1970 fiscal year it processed 39 applications for issuance of securities valued at nearly $1.5 billion, and in 1971, 43 applications for nearly $1.8 billion.[54] Gulf States alone issued long-term securities valued at approximately $88 million in 1970; $75.2 million in 1971. The FPC's concern for the continually increasing needs of such companies to obtain financing for the construction of generating and transmission facilities including the cost of atomic facilities, conversion of facilities necessitated by fuel shortages, and

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[53] McLean Trucking Co. v. United States, 321, U.S. 67, 79-80.

[54] FPC 1970 Annual Report to Congress, pp. 21, 25; 1971 Report, pp. 18, 21. Volumes cited of course exclude securities exempted from FPC regulation because of regulation by State Securities Commissions or for other reasons.

anti-pollution equipment has caused it to institute new rules for compilation of forecasts of financing requirements.[55]

Long-term securities are customarily issued for cash at competitive bidding under FPC Regulation § 34.1a(b) for the purpose of refunding short-term securities theretofore issued [either under authority of the FPC or under the exemption in § 204(c)] to provide interim financing of construction and other utility operations, or to obtain funds for prospective construction and operations.

Reports filed with the FPC on bidding for securities show that the initial market for utility securities is found principally in wholesaling investment houses. The wholesalers customarily resell the securities to the investing public, including pension funds, institutional investors, and private investors. The willingness of wholesalers to purchase utility securities and the continued availability of the public market for such securities is directly dependent upon the financial integrity of the utility business, public confidence in the operation and regulation of utilities, and maintenance of an orderly market, which includes dependable marketing timetables.

Prospects of selling long-term securities at the lowest cost of money are enhanced by compressing advance planning to the shortest time possible so that when favorable marketing conditions are observed or anticipated, the sale can be consummated while such conditions continue. After all determinations as to type of security to be issued, terms, amount, and timing have been made and essential documents prepared, then assuming expeditious action by regulatory agencies, lead time of from 45 to 90 days from commencement of preparation to file with a regulatory

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[55] FPC Notice of Proposed Rulemaking, Docket No. R 443, May 26, 1972.

agency may reasonably be anticipated.[56] The longer lead time required, the more risk of market misjudgment with its resultant effect on cost of capital, and thus cost of service.

The FPC records show, so far as has been determined, that prior to the intervention sought by the Cities in this case, no petition to intervene or protest in a financing application under § 204 had ever occurred. No threat had ever before been posed to FPC control over its processing of applications to maintain financial time schedules and orderly marketing under § 204 applications.

Recognition of the importance of expedition and commitment to a policy of adhering to time schedules in the administration of §204 of the Act was made by the FPC

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[56] Priest, *Principles of Public Utility Regulation*, Vol. 1, pp. 462-3 (1969).

"Thus the agenda that must be followed by the average utility enterprise will run from six weeks to two months or longer, even on the assumption that bonds, debentures and stock will all be sold at the same time.

"If, for example, approval of the proposed securities must be obtained from the Federal Power Commission under the Federal Power Act or from the Securities and Exchange Commission under the Public Utility Holding Company Act, four weeks should be allowed between the filing of the utility's application and issuance of the Commission's order. Three to four weeks normally will be required to complete the process of registration under the Securities Act of 1933. Not less than the same amount of time will elapse between the submission of petitions to state regulatory authorities and formal action by them. Then another week will be required to complete and execute contracts for the purchase of the securities, physically to issue bonds, debentures or stock, and to agree upon the closing memorandum, opinions of counsel and sundry other necessary papers. If particular securities have been listed on a national securities exchange, new issues must be registered under the Securities Exchange Act of 1934, not a difficult process if there has been compliance with the 1933 Act. No fewer than two meetings of the company's board of directors must be held and the minutes of those meetings, as well as forms of securities and other documents, will be subjected to searching scrutiny. Certain of the periods will run concurrently, but if the first application to a regulatory agency is filed on the 10th of March, all gears must mesh if the securities are to be delivered and certi-

in *Pacific Power & Light Co.*,[57] and abided in the present proceeding. The FPC explained its holding in *Pacific Power & Light Co.* in these terms:

> It should also be observed that procedures for considering security issues must be expeditious if, in view of changing marketing conditions, utilities are to be able to raise the money needed to carry out their responsibilities .... It would be a serious abuse of power for this commission to require a hearing and thus delay a $55 million security issue, merely because a small fraction of the proceeds is to be devoted to the construction of facilities which, at extra cost, are susceptible of improvement to enlarge their capacity for a future use which may not materialize. It would be an even more serious abuse of power were we to hold up this security issue merely because questions relative to the disposition of Bonneville's power are politically controversial.[58]

Experience since the Congress enacted the Federal Power Act in 1935 has justified provision for uncomplicated, easily applied standards for the timely issuance of securities to fund new construction for expanding electric loads.[59]

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fied checks actually received on April 30th. Incidentally, the more important corporate papers which must be prepared, prayed over and approved in the consummating of any substantial financing make a volume as thick as a modern unabridged dictionary."

[57] 27 FPC 623 (1962).

[58] *Id.* at 630.

[59] "Since World War II, the problem of new capital has been, and will continue to be, compellingly urgent for public utility managements. Railroads may not enlarge their trackage significantly and may continue to rely largely on internal resources and the ubiquitous equipment trust to finance additional and more efficient rolling stock. But the electric, natural gas, communications, and water industries, as well as the airlines, must go to the investment fraternity for staggering amounts. . . . our economy may not generate enough savings to do the job. Competition for the investor's dollar will remain intense . . .

"With some exceptions, utility service is being provided at

Adherence to the overriding Congressional purpose of § 204 by excluding anticompetitive considerations in a pure financing proceeding such as this case simplifies the administrative process under § 204 and avoids wasteful duplication of administrative effort. In this case, there were a number of procedures available for appropriate consideration of the Cities' complaints. The Justice Department had authority to investigate, either on its own intiative or upon complaint by the Cities, FPC, or others, and, if called for, bring action with regard to the activities alleged.[60] The Cities could have instituted private actions under state and federal laws, not being under restraints comparable to those imposed on private parties by § 16 of the Clayton Act[60a] in matters as to which agencies such as the ICC

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bargain-counter rates and in tremendously expanding volumes, requiring huge expenditures for the improvement and expansion of physical facilities. The airlines, electric, telephone and natural gas companies probably have expanded more rapidly than any of their utility rivals . . .

"Growth of the electric utility industry has been only a little less spectacular. Between 1950 and 1966, electric generating capacity in the United States increased three and one-half times, or from 69,000,000 to 246,000,000 kilowatts, with 620,000,000 kilowatts expected in 1980. New construction put in service by investor-owned companies was up from $26.7 billion in 1950 to $50 billion in 1967. Total electric company plant account stood at $71.3 billion in the latter year.

". . . the new capital requirements of the utility industry in the next ten years will call for extraordinary effort. The obvious reasons are (1) that regulated public utilities literally cannot produce as much cash through retained earnings as unregulated industrial enterprises and (2) that the utilities, in any event, need a much larger investment per dollar of annual revenue than the characteristic industrial." Priest, *Principles of Public Utility Regulation*, Vol. 1, pp. 451-2 (1969).

[60] As noted by the FPC in its Memorandum for the Federal Power Commission in Opposition to Petitioners' Application for Writ of Certiorari filed with this Court, the Justice Department has in fact instituted an investigation of the activities covered by the Cities, allegations by issuance of a Civil Investigative Demand to the utility companies alleged to be involved.

[60a] 15 USC § 26. Significance of such restraints is discussed in *Denver & Rio Grande* at p. 502.

are obligated to enforce the Act. The Cities could have sought remedy under § 202 if they had sought an interconnection or filed a direct complaint under § 306 of the Federal Power Act if they claimed any violation of such Act.[61]

The antitrust issues raised by the Cities fell within areas of activity not subject to FPC regulation, involving difficult issues of antitrust law the FPC was not authorized to adjudicate. Consideration of such matters under § 204 would have merely added burden, delay, and expense to the proceeding without reasonable benefit or prospect for meaningful result for the Cities or the FPC.

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[61] Such was the procedure expressly recommended by the FPC in an analogous situation. See *Western Mass. Elec. Co. Proj. No. 1889*, 39 FPC 723, 736, 738 (1968), rehearing denied, 40 FPC 296, aff'd.; *Munic. Elec. Assn. of Mass.* v. *FPC*, 414 F.2d 1206 (D.C. Cir. 1969).

In two financial proceedings of Gulf States initiated subsequent to the instant proceeding (FPC Docket Nos. E-7663 and E-7682), faced with substantially identical protests and petitions by the Cities and deferring to the mandate of the Court of Appeals that the allegations of the Cities be heard either in the § 204 proceeding or in another proceeding, the FPC severed such protests for investigation and hearing by deeming the filing by the Cities to be in the nature of a complaint under § 306 of the Federal Power Act. The adoption of this mechanism by the FPC is supported by principles recently affirmed by this Court in *Federal Power Commission* v. *Louisiana Power & Light Co.*, ... U.S. ..... No. 71-1016, June 7, 1972. In such case involving a similar statute the Court accepted the need for the FPC to be flexible and free to make "pragmatic adjustments which may be called for by particular circumstances" in circumstances not unlike those in the instant case in that "delay incident to determination" was a significant factor. While the procedure so adopted by the FPC has been successful in accomplishing a proper accommodation between the policies controlling it in the financing proceedings and any duties it may be shown to have by the Cities with regard to their allegations, the threat of unreasonable interference with or delay of public utility financing under § 204 proceedings and imposition of improper responsibilities on the FPC under § 204 by the mandate of the Court of Appeals should be removed by this Court.

II. If the FPC Had Jurisdiction to Investigate Sherman Act Violations in § 204 Proceedings, If It Saw Fit, Its Refusal To Do So in This Case Was Not Error.

A. The FPC Finding That the Matters Asserted and Activities Alleged by the Cities Were Irrelevant to the Purpose of Issuing Bonds to Refund Short-Term Indebtedness Theretofore Authorized by the FPC Was a Fact Finding or Conclusion Which the Court of Appeals Below Was Not Free to Set Aside or Disregard.

The FPC did not ignore or fail to consider the allegations of the Cities in this case. The Cities' pleadings with exhibits were extensive. The FPC granted the Cities' request to intervene[62] to allow consideration of their petition.[63]

After consideration of the entire record, the FPC found:

(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which required a hearing.[64]

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[62] Gulf States urged below that the FPC deny intervention since the Cities failed to make substantial factual allegations of injury to their interests which could result from FPC orders authorizing issuance of bonds for repayment of short-term notes. See *Sierra Club* v. *Morton*, 92 S. Ct. 1361 (1972); *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968).

[63] R. 303, finding (5).

[64] R. 303.

The FPC explained:

> **The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [sic] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the petitioners, or solve any of the problems outlined by them.[65]**

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[65] R. 302.

For the Cities to be able to successfully contest the refinancing issuance on the theory that the funds might be traceable through the refinancing back to the expenditures authorized in the prior proceeding, or that the refinancing made funds available to Gulf States which would otherwise have to be replaced, would permit the Cities to thereby contest an order of the FPC which has become final and is no longer subject to judicial review. Such earlier order in FPC Docket No. E-7509 had authorized the issuance of short-term notes under Section 204(a) of the Act in amounts not exceeding an aggregate of $80 million outstanding at any one time. Item J of Gulf States' application in E-7509 stated that the proceeds from the short-term notes would be added to the general funds of Gulf States to be used, among other things, to provide part of the interim funds for construction expenditures. In compliance with FPC Regulation § 34.2(j)(1), a summary of estimated expenditures for 1969 and 1970 relating to a total construction program of $378,685,000 was made and the item by item detailed description of such construction program was included as Exhibit Q of the E-7509 application. Such Exhibit Q consisted of thirty-nine pages of detailed descriptions of the facilities to be constructed, including all (eighty-four) specific projects costing over $100,000 each, detail of special and blanket requisitions, and general and steam plant projects. In addition, as Exhibit P to such application, a map was filed with detailed indication of the location of each construction item. No protest, petition to intervene, or other complaint was filed in such proceeding under Docket No. E-7509, and the order of the FPC was entered approving the issuance of such short-term notes for the purposes indicated.

Further, the FPC also found that the statutory criteria of §204 were satisfied.[66] The FPC had before it all of the information called for under FPC Regulations (Part 34) upon which it customarily based its determinations in §204 proceedings as well as all other information concerning Gulf States, financial and otherwise, in its public records. This included the undisputed facts that approximately $55,000,000 short-term notes were outstanding and maturing, that the FPC order limited short-term financing to $80,000,000, that construction projects had been approved for estimated expenditures during 1969 and 1970 of $378,685,000 (see note 65), and that funds internally generated were not sufficient to fund the approved portion of the construction program and repayment of short-term indebtedness. The record further reflected that proceeds from the bond issue were to be used to pay off the maturing short-term notes.[67]

The conclusions of the FPC in findings (4), (5), (6) and (7) were based on reasonable judgment applied to facts not disputed by the contending parties and accompanied by full explanation. The Court of Appeals erred in rejecting such conclusions.[68]

B. As Intervenors in a § 204 Proceeding Cities Would Not Have Been Entitled to a Hearing Even if They Had Raised Substantial and Relevant Issues.

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[66] R. 303, finding (4).

[67] The representation as to the purpose of use of proceeds from the issue was also made in the registration statement approved by the SEC (R. 377), which was filed to comply with applicable securities law (Securities Act of 1933).

[68] Federal Power Act, § 313(b), App. G. p. 54a, 55a; *Gainesville Utilties Dept.* v. *Florida Power Corp.*, 402 U.S. 515 (May 24, 1971); *Federal Power Commission* v. *Florida Power & Light Co.*, 92 S.Ct. 637 (January 12, 1972). That there is no dispute concerning the evidentiary facts does not permit Court to substitute its judgment for that of the agency. *Gray* v. *Powell*, 314 U.S. 402, 412 (1941). On undisputed facts, the Court is free to disturb the Commission's

Section 204(a) forbids a public utility to issue any security until, upon application, the FPC authorizes it. Section 204(a) does not provide for *notice* of the application nor does any other part of §204 make provision for notice of any proceeding under the section. *Hearing* is mentioned in the section only in §204(b) which provides the FPC, after *opportunity* for hearing, may grant any application under the section *in whole or in part* and with such *modifications* and *upon such terms and conditions* as it may find necessary or appropriate, and from time to time, after *opportunity* for hearing by supplemental order *modify* the provisions of any previous order. The logical meaning of §204(b) is that the *applicant* shall have an opportunity to be heard. This construction of §204 is supported by comparison with other sections of the Federal Power Act and the Interstate Commerce Act. Section 20a of the Interstate Commerce Act *permits a hearing* if the ICC sees fit, but *requires notice*[69] to governors and to the state commissions (omitting, however, the provision for notice "to such other persons as it may deem advisable" found both in §5 of the Interstate Commerce Act and § 203 of the Federal Power Act).

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finding only if it lacks any rational or statutory foundation. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947). A reviewing court cannot set aside an inference because it believes an opposite inference to be more reasonable. If supported by evidence and not inconsistent with law, the agency's finding is conclusive. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 477-8 (1947).

[69] Judge Augustus Hand, in a three judge court opinion in 1921 shortly after addition of § 20a to the Interstate Commerce Act in 1920, said of it:

> Section 268(a) of the Railroad Bill, which regulates the issue of security by common carrier, so far as relevant, provides merely that the Interstate Commerce Commission may authorize a carrier to issue new shares or bonds. This it must do, Section 272(6), upon notice to the Governor of each state through which the carrier passes. The state authorities may oppose and the Commission may hold hearings if it sees fit. Apparently no one else may object. The purpose of these provisions of law is only to prevent overissues of securities and the Commission had no jurisdiction to determine

This is in contrast to the elaborate provisions in §5 (acquisition of control) of the Interstate Commerce Act for notice to governors of states, and carriers, including motor carriers in certain cases, and the requirement of "reasonable opportunity for interested parties to be heard."[70] Further in the same § 5:

> If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for hearing; and *a public hearing shall be held* in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest.[71] (Emphasis supplied.)

Section 203[72] (purchase or other acquisition of the stock of another utility) of the Federal Power Act may be readily equated with § 5 of the Interstate Commerce Act. Like § 5, § 203 provides for *notice* to governors of states where the physical properties are situated and in addition requires notices to State Commissioners and "to such other persons *as it may deem advisable.*" (Emphasis supplied.) It also provides for approval of the application only after *notice and opportunity for hearing.* It is reasonable to read, "opportunity for hearing" in this context as opportunity to the *applicant* and to *persons entitled to notice.* This contrasts with § 204 which requires no *notice* whatever to state commissions or otherwise and makes no explicit provision for participation of any parties other than the applicant in the proceeding. In such context it is reasonable to read "opportunity for hearing" in § 204(b) as

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whether the property received will belong to the carrier when received, or whether there are liens upon it." *Miller* v. *United States* (1921) 277 F. 95, 97.

[70] 49 U.S.C. §5(2)(b).

[71] *Ibid.*

[72] 16 U.S.C. §824b.

meaning opportunity *only* for *applicant* to be heard. Such opportunity for hearing was no doubt supplied to insure constitutional protection of due process to applicants.[73]

Section 308 of the Federal Power Act deals with *hearings* under the chapter, and also with *proceedings* before the FPC. Section 308(b) provides that both hearing and proceedings under the chapter shall be governed by rules of practice and procedure to be adopted by the FPC. By its terms § 308 does not require the FPC to afford an opportunity for hearing to anyone . In § 308(a) it is provided:

> In any proceeding before it the Commission *may* admit as a party . . . any municipality . . . or any competitor of a party to such proceeding . . . (Emphasis supplied.)

The FPC may have relied on this section to admit Cities as parties to the proceedings for the stated purpose of considering the content of their petition.[74]

For the reasons stated, Cities were not entitled to a hearing even though admitted as parties to the proceeding.

Even if Cities might otherwise have been entitled to a hearing, none was required because, on the record, the FPC's ultimate decision in this case would not have been assisted by the receipt of evidence.[75]

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[73] *Morgan* v. *United States,* 304 U.S. 1 (1938).

[74] R. 303.

[75] *Denver Union Stockyard Co.* v. *Producers Livestock Marketing Assn.,* 356 U.S. 282 (1958); *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956); *Pennsylvania Gas & Water Co.* v. *FPC,* No. 71-1126, ... F.2d ..... (D.C. Cir. May 2, 1972); *Groendyke Transport, Inc.* v. *Davis,* 406 F.2d 1158 (5th Cir. 1969), cert. den. 394 U.S. 1012.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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August, 1972

APPENDIX A

Federal Power Act § 204, 16 USC, § 824c

§ 824c. Issuance of securities; assumption of liabilities; filing duplicate reports with Securities and Exchange Commission

(a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after Aug. 26, 1935.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under section 77g and section 781 and 78m of Title 15. June 10, 1920, c. 285, § 204, as added Aug. 26, 1935, c. 687, Title II, § 213 49 Stat. 850.